ATTACHMENT

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DEFENDERS OF WILDLIFE, et al.,	)
	)
Plaintiffs,	)
	)
v.	)
	) Civ. No. 04-1230 (GK)
GALE NORTON, et al.,	) (Defendants' Motions for Summary
	) Judgment presently due on June 3, 2003)
Defendants.	)

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Plaintiffs hereby move for summary judgments on the grounds that there are no material facts in dispute and plaintiffs are entitled to judgment as a matter of law that (1) the July 3, 2003 response by the United States Fish and Wildlife Service ("FWS") to the Court's December 26, 2002 remand of the FWS's refusal to list the Canada Lynx as an endangered species, and (2) the final regulation published by defendants on December 8, 2003 exempting "National Fire Plan" projects from the general "consultation" process mandated by the Endangered Species Act and its implementing regulations, are arbitrary and capricious and contrary to law. This motion is supported by the accompanying memorandum, the Administrative Records filed in connection with these actions, Plaintiffs' Exhibits 1-12, and a Proposed Order.

Respectfully submitted,

s/_____
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May 3, 3005

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	) Civ. No. 04-1230 (GK)
GALE NORTON, Secretary,	)
	)
U.S. Department of the Interior, et al.,	)
	)
Defendants.	)

PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

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Dated: May 3, 2005

INTRODUCTION

This case challenges the refusal by the Department of the Interior ("DOI") and the U.S. Fish and Wildlife Service ("FWS" or "Service"), in response to this Court's December 26, 2002 remand, to list the Canada Lynx as an "endangered," rather than a threatened, species throughout some or all its range in the conterminous United States. As discussed below, in again depriving the Lynx of the added protections it would receive with an endangered classification, defendants simply failed to address the specific issue remanded by the Court – the Service's March 2000 "determination that '[c]ollectively, the Northeast, Great Lakes, and Southern Rockies do not constitute a significant portion of the range'" of the Lynx in the contiguous United States. See Defenders of Wildlife v. Norton, 239 F. Supp. 2d 9, 21 (D.D.C. 2002), vacated in part as moot on other grounds, 89 Fed. Appx. 273 (D.C. Cir. March 3, 2004)) ("Lynx III"). Especially since this determination was critical to the Service's refusal to list the Lynx as endangered, see 239 F. Supp. 2d at 18-19, the agency may not simply disregard the Court's directive regarding the remand proceedings.[1]

Plaintiffs are also challenging a final regulation issued by defendants that greatly reduces legal protections for Lynx and other listed species, by providing that many potentially harmful projects – including logging and road building in Lynx habitat – no longer need to even be reviewed by the FWS or the National Marine Fisheries Service ("NMFS") (collectively "Services") before proceeding, so long as these activities are characterized as "National Fire Plan" projects. Although section 7(a)(2) of the Endangered Species Act, 16 U.S.C. § 1536(a)(2) ("ESA"), provides that "[e]ach Federal agency shall, in consultation with and with the assistance of [FWS or NMFS] insure that any action authorized, funded, or carried out by such agency [] is not likely to jeopardize the

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[1] To avoid confusion, plaintiffs are adopting the same short-hand references to the Court's earlier Lynx cases that the Court itself employed in Lynx III.

continued existence of any" listed species, id. (emphasis added), the newly promulgated regulation allows agencies such as the United States Forest Service ("USFS") and the Bureau of Land Management ("BLM") to make their own determinations, without any "consultation" with the FWS and/or NMFS, that their actions will not "adversely affect" listed species or their critical habitats. 68 Fed. Reg. 68264 (Dec. 8, 2003). As discussed below, this regulation – which defendants refer to as a "counterpart" section 7 regulation, and plaintiffs will call the "Self-Consultation Regulation" – violates the plain language and clear intent of the ESA, accomplishes nothing except the removal of Service biologists from their Congressionally-mandated role in the consultation process, was adopted in violation of the National Environmental Policy Act, 42 U.S.C. § 4321 ("NEPA"), and can only have the effect of placing imperilled species such as the Lynx at even greater risk of extinction.

BACKGROUND

A. STATUTORY AND REGULATORY FRAMEWORK

1. The Endangered Species Act

Congress enacted the ESA with the purpose of providing both a "means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] . . . a program for the conservation of such endangered species . . .." 16 U.S.C. § 1531(b). Principal responsibilities for implementing the Act with regard to terrestrial species have been delegated by the Secretary of the Interior to the FWS, an agency within the Department of the Interior. Id. at § 1532(15); 50 C.F.R. § 402.01(b). With respect to marine species, such responsibilities have been delegated by the Secretary of Commerce to NMFS. Id.

A "species" is defined by the Act to include "any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when

areas within the geographical area occupied by the species, at the time it is listed . . . on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection . . .." Id. at § 1532(5)(A). Designated critical habitat may also include presently unoccupied habitat "upon a determination by the [Service] that such areas are essential for the conservation of the species." Id.

As noted above, under section 7 – which Congress "considered to be the heart of the act," A Legislative History of the Endangered Species Act of 1973, As Amended in 1976, 1977, 1978, 1979, and 1980, at 1103 (1982) (Hereafter "ESA Leg. Hist.") – each federal agency must, "in consultation with" the FWS or NMFS, "insure that any action authorized, funded, or carried out by such agency [] is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification" of the species' designated critical habitat. 16 U.S.C. § 1536(a)(2). Section 7 and the FWS's longstanding implementing regulations, as amended in 1986, set forth a detailed process that must be followed before agencies take or approve actions that may harm a species or impair its critical habitat.

Initially, the action agency must ordinarily prepare a "Biological Assessment" "concerning listed [] species and designated and proposed critical habitat that may be present in the action area . . .." 50 C.F.R. § 402.02; see also 16 U.S.C. § 1536(c)(1). If, based on that Assessment, the agency determines that any contemplated action "may affect listed species or critical habitat," then the agency and the FWS and/or NMFS must pursue "formal consultation," 50 C.F.R. § 402.14(a) (emphasis added), that requires the action agency to submit extensive information to the FWS or NMFS to facilitate "an adequate review of the effects that an action may have upon listed species or critical habitat." Id. at § 402.14(d).

The Services' responsibilities during formal consultation" entail "[r]eview[ing] all relevant information provided by the Federal agency or otherwise available," and then producing a Biological Opinion ("Bio. Op.") containing a "detailed discussion of the effects of the action on listed species or critical habitat," and determining "whether the action, taken together with cumulative effects, is likely to jeopardize the continued existence of listed species or result in the destruction or modification of critical habitat." Id. at §§ 402.14(g), (h). If such "jeopardy" or impairment of critical habitat is found, then the FWS or NMFS must prescribe "reasonable and prudent alternatives" to avoid these results. Id. If the proposed action will result in "take" of a listed species, then the Bio. Op. must also include a statement prescribing "reasonable and prudent measures that the [Service] considers necessary or appropriate to minimize such impact." 16 U.S.C. § 1536(b)(4)(c)(ii).

Moreover, with regard to actions that an action agency has determined "may" affect listed species or critical habitat in any fashion, the FWS's longstanding regulations implementing the ESA allow the formal consultation process and the issuance of Biological Opinions to be avoided only when, prior to the initiation of formal consultation, the FWS issues a "written concurrence" that the proposed action "is not likely to adversely affect listed species or critical habitat." 50 C.F.R. § 402.13(a). During this "informal consultation" between the action agency and the FWS, the Service not only decides whether to "concur" that formal consultation may be avoided, but also "suggest[s] modifications to the action that the Federal agency and any applicant could implement to avoid the likelihood of adverse effects to listed species or critical habitat." Id. at § 402.13(b).

2. National Environmental Policy Act

NEPA – the "basic national charter for protection of the environment," 40 C.F.R. § 1500.1

– requires all agencies of the federal government to prepare a "detailed statement" regarding all "major federal actions significantly affecting the quality of the human environment . . .." 42 U.S.C. § 4332(C). This Environmental Impact Statement ("EIS") must describe, among other matters, the "environmental impact of the proposed action" and "any adverse environmental effects which cannot be avoided should the proposal be implemented." Id.

The Council on Environmental Quality ("CEQ") – an agency within the Executive Office of the President – has promulgated regulations implementing NEPA that are "binding on all federal agencies." See 40 C.F.R. § 1500.3. These regulations require that, unless an activity is "categorically excluded" from NEPA compliance, an agency must either prepare an EIS, or, at the very least, an Environmental Assessment ("EA") that is used to determine whether an EIS is necessary. Id. at § 1501.4.

Among the factors that an agency must consider in determining whether to prepare an EIS are whether a project will affect listed species or "ecologically critical areas, " and "the degree to which the action may establish a precedent for future actions with significant effects." 40 C.F.R. §1508.27. In addition, the agency must consider the degree to which the "action is related to other actions with . . . cumulatively significant impacts." Id. at § 1508.27(b)(7).

B. FACTS PERTAINING TO THE FWS'S REFUSAL TO LIST THE LYNX AS ENDANGERED.

1. The FWS's Initial Refusal To List The Lynx

In prior rulings, this Court has recounted the long history of efforts by plaintiffs to obtain full protection for Lynx under the ESA. See Defenders of Wildlife v. Babbitt, 958 F. Supp. 670, 674-75 (D.D.C. 1997) ("Lynx I"); Lynx III, 239 F. Supp. 2d at 14-17. Accordingly, plaintiffs will simply

summarize the aspects of that history most pertinent to this case.

In 1994, in response to petitions by conservation groups to list the Lynx, Region 6 of the FWS – which encompasses Lynx historic range in Colorado, Montana, and Wyoming – conducted a comprehensive "status review" of the species," and concluded that Lynx "populations in the contiguous United States have suffered significant declines due to trapping and hunting and habitat loss,' and that at least four of the five statutory criteria for listing a species under the ESA apply to lynx." Lynx I, 958 F. Supp. At 676 (quoting 1997 Lynx Administrative Record Document ("1997 Lynx A.R. Doc.") at 19-43). Hence, Service biologists drafted a proposed listing rule stating that there was substantial scientific evidence to warrant listing one segment of the population in the contiguous U.S. – i.e., Lynx populations in the Northeast, Great Lakes, and Southern Rockies – as endangered, and a second segment – in the Northwest and Northern Rockies – as threatened. Id.[2]

This proposal was accompanied by a "50-page analysis of the Lynx's history and current status," Lynx I, 958 F. Supp. at 676, which concluded, based on "extensive citations of scientific evidence," that "Lynx habitat is currently being destroyed, degraded, and fragmented by a number of factors including timber harvest, fire suppression, road construction, and clearing of forests for urbanization, ski areas, and agriculture." Id. at 676 (citing 1997 Lynx A.R. Doc. 35 at 25-27). However, although "not a single biologist or Lynx expert employed by FWS disagreed" with the Region 6 biologists that the Lynx is endangered throughout most if its historic range in the

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[2] The Administrative Record reviewed in Lynx I will be cited as "1997 Lynx A.R." The Record reviewed in Lynx III will be cited as "2002 Lynx A.R." The Record relating to the FWS's July 3, 2003 Federal Register Notice responding to the Court's December 26, 2002 remand – at issue here – is sequentially numbered and contained on a CD-Rom and will be cited as "2003 Lynx A.R. at ___." The government has also produced separate Records for the Self-Consultation Regulations at issue. See infra at n. 7.

contiguous U.S., Service officials in Washington, D.C. nonetheless decided that no listing was warranted. Lynx I, 958 F. Supp. at 676

. **2. Plaintiffs' Challenge To The Service's Refusal To List The Lynx At All**

When plaintiffs challenged the FWS's decision not to list the Lynx, this Court, in March 1997, held that the Service's refusal to protect the species under the ESA violated the Act and disregarded extensive evidence in the Administrative Record detailing that at least four of the five listing factors apply to the Lynx, including the "present or threatened destruction, modification, or curtailment of [the species'] habitat or range" and the species' "susceptibility to trapping, which makes it particularly 'vulnerable to extinction.'" Lynx I, 958 F. Supp. at 681-684. The Court further found that there was "overwhelming record evidence documenting the dramatic decrease over time in the Lynx population in the United States portion of its North American range," and that "[w]ildlife experts currently estimate that the number of Lynx in the entire contiguous United States 'may not exceed several hundred individuals – far fewer than many other species now listed as endangered' under the ESA." Id. at 682 (quoting 1997 Lynx A.R. Doc. 248, at 25); see also id. ("the scientific studies and analyses in the Administrative Record predict that such trends will continue absent legal protection of the species, due to ongoing damage to Lynx habitat by logging, fire suppression, roadbuilding, and other development").

In response to the Court's ruling, the FWS "assembled an inter-regional team of field biologists that was 'assigned to review the existing administrative record, incorporate any new (and relevant) scientific or commercial data that [had] become available,'" and "develop a new finding." Lynx III, 239 F. Supp. 2d at 15 (internal citation omitted). Once again, the "Service's biologists [] concluded that Lynx had been eliminated from most of their range in the U.S." Id.

In May 1997, the FWS published a notice of a new "12-month finding" in the Federal Register. 62 Fed. Reg. 28653-28657 (May 27, 1997). The new finding echoed the 1994 draft proposed rule's assessment of the dire threats to the existence of the Lynx posed by such factors as logging, roadbuilding, fire suppression, and trapping. The FWS once again made detailed findings, supported by extensive scientific documentation, that the Lynx warranted listing based on four of the five statutory criteria: present or threatened habitat destruction, overutilization for commercial purposes, inadequacy of existing regulatory mechanisms, and other natural or manmade factors. Id. The Service also "determined that the overall magnitude of all threats to the small population of Canada lynx in the contiguous United States is high and the threats are ongoing, thus they are imminent." Id. (emphasis added).[3]

3. The Court's Ruling in Lynx III.

In July 1998, the FWS published a proposal to list as "threatened" the "contiguous [U.S.] population segment of the Canada Lynx," 63 Fed. Reg. 36994, on the grounds that this "population segment" is "threatened by human alteration of forests, low numbers as a result of past overexploitation, expansion of the range of competitors (bobcats[] and coyotes[]), and elevated levels of human access into lynx habitat." Id. at 36994. In its proposal, the FWS found that "historically, Canada lynx were residents in 16 of the contiguous United States," but that the

[3] While agreeing that listing of the Lynx was "warranted," the Service found that it was "precluded" by the Service's need to work on other species purportedly of "higher priority." 62 Fed. Reg. 28657. After plaintiffs filed another lawsuit challenging the FWS's "warranted but precluded" finding, the Court issued an Order stating that "'[d]efendant's own 12-month finding makes clear that 'total extinction of the Lynx population is a distinct possibility.'" Lynx III, 239 F. Supp. 2d at 16 (quoting Defenders of Wildlife et al. v. Babbitt et al., Dec. 22, 1997 Order at 2-3, 1:97CV02122(GK)) ("Lynx II")). Shortly thereafter, the Court approved a settlement agreement between the FWS and the plaintiffs that called for the Service finally to publish a proposed rule to list the Canada Lynx in the contiguous U.S. Lynx III, 239 F. Supp. 2d at 16.

> overall numbers and range of Canada lynx in the contiguous United States are substantially reduced from historic levels. Currently, resident populations of lynx likely exist in Maine, Montana, Washington, and possibly Minnesota. States with recent records of individual lynx sightings, but possibly no longer sustaining self-supporting populations, include Wisconsin, Michigan, Oregon, Idaho, Wyoming, Utah, and Colorado.

Id. at 37007 (emphasis added).

In supporting its proposal, the Service again found that four of the five statutory bases for listing were satisfied. With regard to each of the statutory factors that the FWS found supported its listing proposal, the Service published a detailed scientific explanation for why that factor applied. With respect to the destruction and modification of habitat, for example, the Service explained that, "[i]n all regions of the contiguous United States lynx range, clearing of forests for urbanization, recreational developments such as ski areas, and agriculture has fragmented, degraded, or reduced the available suitable lynx habitat, reduced the prey base, and increased human disturbance and the likelihood of accidental trapping, shooting, and highway mortality." 63 Fed. Reg. 37003.

In March 2000, the FWS issued a final decision listing the Lynx, but only as threatened, rather than endangered, throughout its range in the contiguous U.S., although the Service recognized that Lynx have suffered precipitous declines throughout much of that range. 65 Fed. Reg. 16052. In its listing decision, the Service found that, "[w]ithin the contiguous United States population segment, the range of the lynx is divided regionally by ecological barriers of unsuitable lynx habitat." 65 Fed. Reg. 16060. The Service identified these four regions as "(1) the Northeastern Region, including Maine, New Hampshire, Vermont, and New York; (2) the Great Lakes Region, including Michigan, Wisconsin, and Minnesota; (3) the Northern Rocky Mountain/Cascades Region, including Washington, Oregon, Idaho, Montana, northwestern Wyoming, and Utah; and (4) the Southern Rocky Mountains Region, including Colorado and southeastern Wyoming." Id.

Moreover, the "Service itself acknowledged the imperilled status of the Lynx in at least two of its historical regions." Lynx III, 239 F. Supp. 2d at 18. As explained by this Court:

> [w]ith respect to the Northeast region, FWS found that 'the lynx is extirpated from New York;' that although 'Lynx historically occurred in New Hampshire, . . . recent records of lynx occurrence in New Hampshire are rare;' and that 'the State of Vermont currently considers lynx to be extirpated.' Similarly, with respect to the Southern Rockies region, the Service found that 'a resident lynx population historically occurred . . . in both Colorado and southeastern Wyoming . . . [and that] [t]his resident population may now be extirpated.'

Id. (quoting 65 Fed. Reg. At 16055-56, 59). In addition, despite "limited available data," the final listing rule "makes it clear that, if any resident Lynx population does exist in the Great Lakes region, it is rare." 239 F. Supp. 2d at 19. The listing decision further found that, compared with the species' highly depleted status in the Northeast, Great Lakes, and Southern Rockies, the Northern Rockies/Cascade region now "has the strongest evidence of persistent occurrence of resident lynx populations." 65 Fed. Reg. at 16061.

Nonetheless, while its own findings appeared to support the proposition that the Lynx is at least "in danger of extinction throughout . . . a significant portion of its range," 16 U.S.C. § 1532(6) (emphasis added) – and hence should have been listed as endangered – the Service declined to make that decision. Rather, the agency avoided an endangered listing by announcing that "[c]ollectively, the Northeast, Great Lakes, and Southern Rockies do not constitute a significant portion of the range of the" the Distinct Population Segment ("DPS") consisting of Lynx in the contiguous United States, and do not "contribute substantially to the persistence of the contiguous United States DPS." 65 Fed. Reg. at 16061 (emphasis added). Accordingly, the Service concluded that only the "Northern Rockies/Cascades Region is the primary region necessary to support the continued long-term existence of the contiguous United States DPS." Id. (emphasis added).

The FWS's refusal to list the Lynx as endangered, as well as its explicit finding that three of the four geographical regions where Lynx historically existed "do not constitute a significant portion" of the species' range in the contiguous U.S., has had enormous legal and practical implications for how the FWS implements ESA protections for the species. For example, by finding that three of the four discrete lynx populations do "not contribute substantially to the persistence of the contiguous U.S. lynx population," the FWS foreclosed, or at least severely restricted, its ability to find, in conducting consultations under section 7, that any federal or federally approved action in the Northeastern, Great Lakes, or the Southern Rocky Mountain – no matter how damaging to Lynx survival or recovery in those areas – is "likely to jeopardize the continued existence" of Lynx in the lower 48 states. 16 U.S.C. § 1536(a)(2).[4]

Accordingly, in 2000, plaintiffs filed another lawsuit challenging defendants' refusal to list the Lynx as endangered, particularly the agency's finding that three of the four historic Lynx populations in the contiguous U.S. are not "significant." In addition, plaintiffs sought relief from the FWS's conceded failure to designate "critical habitat" for the Lynx "concurrently" with the final listing decision, as required by the ESA. See 16 U.S.C. § 1533(a)(3)(A)(i).

In December 2002, the Court ruled for plaintiffs on both issues. With regard to the designation of critical habitat, the Court held that the "Service [is] in patent violation of an

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[4] By listing the Lynx as threatened, rather than endangered, the Service also allowed "takings" of the species that would otherwise be strictly prohibited by the ESA. Thus, the final listing decision included a "special rule" issued under section 4(d) of the Act, 16 U.S.C. § 1533(d) – which would not be permissible if Lynx were listed as endangered – providing that any person "may take lawfully obtained captive lynx without a permit," and "may export captive live lynx, parts or products of captive lynx . . .." 58 Fed. Reg. 16084-85. In the preamble to the rule, the Service also said that it is "preparing an additional special 4(d) rule to address incidental take of lynx resulting from otherwise lawful hunting and trapping" activities. Id. at 16067.

unequivocal statutory mandate," and that "by failing to comply with this mandatory, nondiscretionary duty unambiguously imposed by the ESA, FWS has undermined the purpose and function" of the ESA's section 7 consultation process. Lynx III, 239 F. Supp. 2d at 22, 25. The Court rejected the government's contention that the "[s]ection 7 consultation process adequately protects the Lynx in the absence of critical habitat designation," reasoning that this "contention is directly contrary to the plain language of the ESA and Congress's statutory mandate," which imposes an additional consultation requirement where an action will result in the "destruction or adverse modification" of critical habitat. Id. at 24. Thus, the Court concluded that the "Lynx cannot, by definition, receive the full extent of protection provided by the ESA and the Section 7 consultation process until its critical habitat is designated." Id. (emphasis added).[5]

With regard to the listing issue, the Court found that the "FWS's conclusion that [] three, of the Lynx's four regions, are collectively not a significant portion of its range is counterintuitive and contrary to the plain meaning of the ESA phrase 'significant portion of its range.'" Lynx III, 239 F. Supp. 2d at 19. Relying on a dictionary definition of "significant," the Court reasoned that, "[i]t is difficult to discern the logic in the Service's conclusion that three large geographical areas, which

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[5] As relief for this statutory violation, the Court initially ordered the Service to undertake "prompt" critical habitat rulemaking. 239 F. Supp. 2d at 25, 26. Subsequently, however, because the FWS "openly and willfully ignored the Court's order to undertake a prompt rulemaking on the designation of critical habitat," the Court "conclude[d] that the only way to ensure that FWS carr[ies] out its statutory mandate is to impose a time-specific rulemaking schedule." Lynx III, Jan. 15, 2004 Mem. Op. at 11, 13-14. Accordingly, the Court subsequently imposed a specific schedule, under which the FWS must submit to the Federal Register a proposed rule for designation of critical habitat by no later than November 1, 2005, and must submit to the Federal Register a final rule by no later than November 1, 2006. Lynx III, April 29, 2004 Order at 1. According to defendants' most recent "status report" concerning the critical habitat designation, in response to the Court's revised remedial order, the Service is finally "mak[ing] progress towards developing a proposed rule to address critical habitat for the Canada lynx." Lynx III, Defendants' Fourteenth Status Report (April 19, 2005).

comprise three-quarters of the Lynx's historical regions, are not a 'noticeably or measurably large amount' of the species range," and hence, "[a]t a minimum, the Service must explain such an interpretation that appears to conflict with the plain meaning of the phrase 'significant portion.'" Id. (quoting Webster's Ninth Collegiate Dictionary at 1096) (emphasis added). The Court further held that the Service's "focus on only one region of the Lynx's population – the Northern Rockies/Cascades – to the exclusion of the remaining three-quarters of the Lynx's historic regions, is antithetical to the ESA's broad purpose to protect endangered and threatened species." Lynx III, 239 F. Supp. 2d at 19.

The Court also relied heavily on a "comprehensive opinion" by the Ninth Circuit "examining the phrase 'significant portion of its range' and the ESA's legislative history," and "conclud[ing] that a species could be 'extinct throughout . . . a significant portion of its range' if there are major geographical areas in which it is no longer viable but once was.'" Lynx III, 239 F. Supp. 2d at 20 (quoting Defenders of Wildlife v. Norton, 258 F.3d 1136, 1145 (9th Cir. 2001)). After "[a]pplying this standard to the record in this case," the Court concluded that "it is clear that FWS's determination that, collectively, three of the four Lynx populations do not constitute a significant portion of its range is erroneous or, at a minimum, inadequately reasoned," because the "Service's own Final Rule makes clear that 'there are major geographical areas in which [the Lynx] is no longer viable but once was,'" particularly in the Northeast and Southern Rockies. Id. (emphasis added).[6]

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[6] The Court also noted that, as in the Ninth Circuit case, the "logical consequence of the analysis presented by the Service is a disproportionate focus on public lands." Lynx III, 239 F. Supp. 2d at 20 n. 9. In particular, in the Northern Rockies and Cascades region – which the FWS had declared to be the "primary region necessary to support the continued long-term existence of the contiguous United States DPS," 65 Fed. Reg. at 16061, 16082 – the vast majority of Lynx habitat "is comprised of federal lands." 239 F. Supp. 2d at 20 n. 9. In contrast, since the Service had "acknowledged that the overwhelming majority of the regions it determined not to be

Accordingly, the Court "set aside" and "remanded for consideration and explanation" the FWS's specific determination that "'[c]ollectively, the Northeast, Great Lakes, and Southern Rockies do not constitute a significant portion of the range of the DPS.'" 239 F. Supp. 2d at 21 (internal citation omitted) (emphasis added); see also Lynx III, Dec. 26, 2002 Order at 1-2 ("Order[ing]" that "Defendants' determination that '[c]ollectively, the Northeast, Great Lakes, and Southern Rockies do not constitute a significant portion of the range of the DPS,' is set aside and remanded for further consideration of the Lynx's status under the ESA consistent with the analysis set forth in the accompanying Memorandum Opinion.").

4. Defendants' Failure to Address the Specific Issue Remanded by the Court

In March 2003, the FWS published a Federal Register Notice stating that, "[a]s directed by the Court, we are re-evaluating th[e] determination" that "'[c]ollectively, the Northeast, Great Lakes and Southern Rockies do not constitute a significant portion of the range of the DPS.'" 68 Fed. Reg. 12611, 12612 (March 17, 2003) (emphasis added); see also 2003 Lynx A.R. at 134. Accordingly, the Service "reopen[ed] the comment period on our determination concerning the significant portion of the range of the lynx," and stated that, "[i]n particular, we are seeking comment on – (1) [t]he quantity of lynx habitat and (2) the quality of lynx habitat." Id.

In response, plaintiffs and many others submitted comments and scientific information reinforcing the biological and geographical importance of the three Lynx regions deemed "not[] significant" by the Service. For example, in comments submitted on behalf of the National Wildlife

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significant are comprised of non-federal lands," the Court reasoned that, "[j]ust as the Service in the Ninth Circuit case could not neglect the [flat-tailed horned] lizard's status on private land, if that region constituted a significant portion of the species' range, neither can the Service do so in this case." Id.

Federation, Jamie Clark – a former director of the FWS – explained that the "Northeast, Great Lakes, and Southern Rockies regions comprise significant portions of the range of the lynx" because these regions "are significant for the species not only in their scope and potential quantity of habitat, but also for the distinctive characteristics of that habitat." 2003 Lynx A.R. at 3047-49. Many commenters also pointed out that recent data show that remnant populations of Lynx are indeed struggling to survive in these regions, and hence that the FWS should not simply "write off" these populations by declaring them not "significant" to the survival and recovery of Lynx in the contiguous U.S. 2003 Lynx A.R. at 3453 (Biodiversity Conservation Alliance); id. at 3054 (Defenders of Wildlife) ("The fact that lynx in Maine are reproducing successfully and are doing so in consecutive years establishes that this is a significant lynx population"); id. ("In Minnestoa, there have been 62 verified lynx sightings as well as 6 reports that provide evidence of reproduction").

On July 3, 2003, the FWS published in the Federal Register a "Clarification of Findings" and "Notice of Remanded Determination of Status for the Contiguous United States Distinct Population of the Canada Lynx." 68 Fed. Reg. 40076. Remarkably, however, although the Service's new Notice contained yet another lengthy discussion of the threats facing the Lynx in the contiguous U.S. and the applicability of the section 4 listing "factors," id. at 40084-98, the agency never actually addressed the specific issue remanded by the Court.

Thus, in its new Notice, the FWS clearly recognized that the "only portion of our March 24, 2000 final listing determination that the court remanded for further consideration was our determination that '[c]ollectively, the Northeast, Great Lakes and Southern Rockies do not constitute a significant portion of the range of the DPS.'" 68 Fed. Reg. 40080. Yet, while asserting that "[o]ur finding on this limited remand is discussed below," id. (emphasis added), the FWS's notice never

actually addresses whether the Northeast, Great Lakes, and the Southern Rockies do, in fact, "constitute a significant portion of the range of the lynx" in the contiguous U.S. Instead, the new finding addresses a different issue, i.e., whether the Lynx is "in danger of extinction throughout a significant portion of its range within the Northeast, Great Lakes, or Southern Rockies . . .." Id. at 40101 (emphasis added). However, that issue was not remanded by the Court because, in the 2000 decision, the Service had already "acknowledged the imperilled status of the Lynx in at least two of its historical regions" – the Northeast and Southern Rockies – and had found that "if any resident Lynx population does exist in the Great Lakes regions, it is rare." Lynx III, 239 F. Supp. 2d at 18, 19.

In any event, as to the issue the July 2003 Notice did address, the FWS declared that the Lynx is not "in danger of extinction throughout a significant portion of its range within the Northeast, Great Lakes, or Southern Rockies," 68 Fed. Reg. at 40101, although the Service, in its March 2000 listing determination, had found that Lynx were so severely depleted in these same regions that they do "not contribute substantially to the persistence of the contiguous United States DPS," 65 Fed. Reg. 16061 (emphasis added). However, not only did the FWS fail even to acknowledge this contradiction between its 2003 and 2000 findings on the status of Lynx in these areas, but the new Notice refers to many grave threats faced by Lynx in the three populations previously described by the Service as unable even to "contribute" to the survival of Lynx in the contiguous U.S.

For example, of particular pertinence to plaintiffs' challenge to the Self-Consultation Regulation, the Notice acknowledges that "natural fire plays a significant role in creating the mosaic of vegetation patterns, forest stand ages and structure that provide good lynx and snowshoe hare habitat," and hence that "increased interest in fire suppression and reduction of heavy fuels has the

potential to affect snowshoe hare habitat" and hence greatly harm Lynx, which depend on snowshoe hare for their survival. 68 Fed. Reg. at 40093-94. Yet the new Notice characterizes the threat to Lynx from these activities as "currently low," id. (emphasis added), but contains no analysis of how Lynx will be affected by the logging, road building, and related activities that will result from the Bush Administration's implementation of the National Fire Plan. See infra at 20-22.

Similarly, with regard to Lynx in the Northeast, the Notice acknowledges that "lynx habitat is supported almost entirely on a non-Federal land base[], predominantly commercial forest lands," and that the "quantity of lynx habitat in Maine is expected to decline." Id. at 40094 (emphasis added). Yet the Notice characterizes the "threat to lynx in the Northeast because of timber harvest and associated activities" as only "moderate," while also conceding that "we do not know if future timber harvest practices will continue to provide conditions that are capable of supporting snowshoe hare densities . . .." Id. (emphasis added).

The new Notice also again acknowledges that Lynx may have already been eliminated from large parts of its historic range, including in Colorado, New Hampshire, New York, and Wyoming. Id. at 40085, 40087, 40090, 40091. Yet, while again identifying several "major geographical areas in which the [Lynx] is no longer viable but once was," Defenders of Wildlife, 258 F. 3d at 1145, the Service again refused to list the species as endangered in the contiguous U.S. on the grounds that Lynx in the Northeast and Great Lakes "are not in danger of extinction," 68 Fed. Reg. 40100, and that, although the Lynx does "face[] possible extirpation" in the "Southern Rocky Mountains," this entire region – which encompasses the Lynx's range in Colorado and Southern Wyoming and represents the southernmost population of Lynx in the world – "do[es] not constitute a significant portion of the range of the lynx." Id.

By letter dated March 11, 2004, as required by the ESA's citizen suit provision, 16 U.S.C. § 1540(g), plaintiffs provided defendants with formal notice that their latest refusal to list the Lynx as endangered violated the ESA. See Exh. 1. Plaintiffs pointed out that the new Notice "never squarely answers the specific issue remanded by the Court," id. at 3, and that "even the 'new' evidence discussed in the finding underscores the tenuous status of the Lynx throughout much, if not all, of its range in the U.S." Id.

Plaintiffs' notice letter also explained that the finding is "expressly and repeatedly based on the proposition that the Forest Service and BLM will modify their activities and land management plans to be consistent" with a "Lynx Conservation Assessment and Strategy ("LCAS") approved in 2000. Id. at 6; see 68 Fed. Reg. 40093, 40096 (asserting that the USFS and BLM will "abide" by the LCAS and that the "LCAS was developed to provide a consistent and effective approach to conserving Lynx on Federal lands"). Plaintiffs explained, however, that "even years after the listing decision, most Federal land management plans have yet to be amended to provide long-term conservation for lynx," and that the USFS and BLM are, in fact, refusing to abide by the LCAS in making decisions concerning logging, road construction, mining, grazing, snowmobile use, and oil and gas exploration, among many "other harmful activities," in Lynx habitat. Exh. 1 at 7.

Plaintiffs further explained that the USFS and BLM were refusing to comply with the LCAS in carrying out "fire management" activities, and that this harm to the Lynx was compounded by adoption of the Self-Consultation Regulation, which "effectively eliminat[ed] the section 7 consultation protections with regard to a host of potentially harmful activities in Lynx habitat." Id. at 9. However, since plaintiffs never received any response to this letter, they had no recourse but to return to this Court for relief.

C. FACTS PERTAINING TO DEFENDANTS' ADOPTION OF THE SELF-CONSULTATION SECTION 7 REGULATION

1. The Bush Administration's "Healthy Forests Initiative" And Subsequent Proposal To Eliminate Section 7 Consultations For The First Time In The History of the Endangered Species Act

In August 2000, President Clinton asked the Secretaries of the Interior and Agriculture to prepare a report recommending how best to reduce the impacts of that year's severe "wildland fires on rural communities, and ensure sufficient firefighting resources in the future." Managing the Impact of Wildfires on Communities and the Environment 1 (Sept. 8, 2000), Fish and Wildlife Service Counterpart Regulation Administrative Record ("FWS CR A.R., Vol. 10 at S16).[7]

On September 8, 2000, the Secretaries provided a "Report to the President In Response to the Wildfires of 2000" that made a number of general recommendations for how to reduce the adverse impacts of catastrophic wildfires, including more effective "firefighting management and preparedness," id. at S27, and "local community coordination and outreach." Id. at S31. The Report stated that "[n]otably, the Administration's wildland fire policy does not rely on commercial logging or new road building to reduce fire risks and can be implemented under its current forest and land

[7] The government has filed several separate Administrative Records pertaining to the Self-Consultation Regulation. The FWS Record initially filed with the Court consisted of 8 volumes, but omitted many pertinent documents. See Defendants' April 22, 2004 Notice of Filing Supplemental Administrative Record of the United States Fish and Wildlife Service for Joint Counterpart Endangered Species Act Consultation Regulations. Accordingly, at plaintiffs' request, the FWS filed a new Record that now consists of 13 volumes and will be cited as "FWS CR A.R., Vol. __, at __." The Administrative Record submitted by NMFS, which consists of four volumes, will be cited as "NMFS CR A.R., Vol. __, at __." The BLM – which cooperated in the issuance of the regulations and signed an agreement implementing the regulations – has filed its own "Supplemental Administrative Record" pertaining to the regulations. That Record will be cited as "BLM CR A.R., Vol. _, at __." Finally, the USFS – the other action agency that is now implementing the regulations – has represented that all of its pertinent records are included within the Administrative Records submitted by the FWS and NMFS. See Defendants' April 22, 2004 Notice of Filing Declaration of Marc Bosch.

management policies." Id. at S26 (emphasis added). Indeed, with regard to the importance of maintaining roadless areas in national forests, the Report stated that "[f]ires are almost twice as likely to occur in roaded areas as they are in roadless areas." Id. at S27. Moreover, the Clinton Administration Report did not suggest that compliance with environmental laws, or opportunities for judicial review, had in any way hampered efforts to combat severe wildfires. To the contrary, the Report stressed that "timber sales" and other activities "should proceed only after all environmental laws and procedures are followed," and that timber "[r]emoval activities that do not comply with environmental requirements can add to the damage associated with fire-impacted landscapes." Id. at S35 (emphasis added).

In 2002, however, the Bush Administration announced a very different approach to addressing the issue of wildfires on public lands. In a speech on August 22, 2002, President Bush announced a "Healthy Forest Initiative" based on the proposition that it "makes sense to clear brush," and that unidentified "[p]eople" are "using litigation to keep the United States of America from enacting common sense forest policy." FWS CR A.R., Vol. 10, at S53. The accompanying policy – called "Healthy Forests: An Initiative for Wildlife Prevention and Stronger Communities," id. at S59 – "call[ed] for more active forest and rangeland management" on 190 million acres of public lands, and was based on the premise, as articulated in the President's speech, that "needless red tape and lawsuits delay effective implementation" of projects that the Administration seeks to pursue on federal lands, including – in sharp contrast to the Clinton Administration Report – "[t]imber sales to achieve fuels reduction" and other methods of "thinning [] forests." Id. at S61, S68, S72 (emphasis added).

According to the "Healthy Forests Initiative," timber sales and other "vital projects are often

significantly delayed and constrained by procedural delays and litigation," id. at S72, including the awarding of "injunctive relief to litigants based on short-term grounds, without deference to expert assessments of long-term risks to property . . .." Id. at S74. The Initiative specifically asserted that "fuels reduction projects" such as timber sales are "often delayed or prevented due to litigation over Endangered Species Act requirements," id. at S65 (emphasis added), but pointed to no specific instances of when the consultation process required by section 7 of the ESA had delayed any needed project. Nonetheless, the Initiative stated that President Bush was "directing" defendant Gale Norton and other Administration officials to "[r]educe . . . environmental reviews" and to take action to "allow timber projects to proceed without delay . . .." Id. at S62.

As directed by the President, on June 5, 2003, the FWS and NMFS, along with the Forest Service, BLM, and several other agencies, published a Federal Register Notice proposing regulations that, "[a]s part of the President's Healthy Forests Initiative," would largely eliminate – for the first time in the history of the ESA – the requirement for section 7 consultation with the FWS or NMFS regarding projects that would "support the National Fire Plan" ("NFP"). 68 Fed. Reg. 33806, FWS CR A.R., Vol. 3, at F100-107. The proposed regulation defined the NFP as the "September 8, 2000 report to the President from the Departments of the Interior and Agriculture . . . together with the accompanying budget requests, strategies, plans, and direction, or any amendments thereto." 68 Fed. Reg. 33811. The proposal did not delineate which "budget requests," "strategies," "plans," "direction" and "amendments" for which the Administration was proposing to bypass consultation.

In the June 2003 Notice, defendants specifically proposed to "eliminate the need to conduct informal consultation and eliminate the requirement to obtain written concurrence from the Service for those NFP actions that the Action Agency determines are 'not likely to adversely affect' (NLAA)

any listed species or designated critical habitat." 68 Fed. Reg. 33806 (emphasis added). The proposal stated that this "alternative consultation process" – under which there would actually be no "consultation" at all with the Services whenever the action agency decided that its own project was not likely to harm a listed species or critical habitat – would apply to all "agency projects that authorize, fund, or carry out actions that support the NFP," including "thinning and removal of fuels to prescribed objectives" – i.e., logging operations – and "road maintenance and operation activities." Id. at 33806-07.

According to the preamble to the proposal, "[u]sing the existing consultation process, the Action Agencies have consulted with the Service on many thousands of proposed actions that ultimately received written concurrence from the Service for NLAA determinations," and the "concurrence process for such projects has . . . caused delays." 68 Fed. Reg. 33808 (emphasis added). The Federal Register Notice, however, did not set forth any evidence documenting NFP (or any other) projects that have been "delayed" because of the need to obtain concurrences from the Services. While asserting that it is defendants' "expectation that the Action Agency will reach the same conclusions as the Service" as to which timber sales and other projects are likely to adversely affect listed species – and hence require formal consultation – the Notice also did not discuss the circumstances under which the FWS or NMFS has disagreed with NLAA determinations by action agencies in the past, or the extent to which the Services' reviews have resulted in project changes or mitigation measures that have improved conditions for listed species. Id. at 33809.

This proposal was greeted with overwhelming opposition by conservation organizations and others, including federal defendants' own regional directors. For example, the FWS's Regional Director in Albuquerque, New Mexico, made clear that the proposal conflicts with the letter and

purpose of section 7 of the ESA because:

> Section 7(a)(2) requires every Federal agency, *in consultation with and with the assistance of the Secretary*, to insure that any action authorized, funded, or carried out by the agency is not likely to jeopardize the continued existence or any listed species, or result in the destruction or adverse modification of critical habitat. The key to [this] paragraph[] is that [it is] carried out in consultation with the assistance of the Service. We serve as an outside and independent agency to review projects, and use our biological knowledge and experience with similar activities to assist in developing appropriate measures that will minimize effects . . . The counterpart regulations as proposed will diminish the Service's role in Section 7 consultation.

FWS CR A.R., Vol. 6, at K391 (italics in original, other emphasis added). The Regional Director further explained that, in addition to their lack of "independen[ce]" from timber sales or other potentially harmful projects, action agencies like the Forest Service and BLM

> do not have the range-wide information on species status, knowledge of past consultations with other Federal agencies that have evaluated project effects on species, or a broad view of threats faced by the species throughout its range. Thus, the action agencies would have a difficult time assessing the effects of their actions in the appropriate context.

Id. at K392 (emphasis added).

The FWS's Region 2 Director also criticized the proposal's failure to "provide definitions of key terms" – such as "what projects would fall under the NFP," id. at K393 – and took issue with the proposal's unsupported rationale that the elimination of consultation with the FWS was needed to expedite necessary projects:

> Funding through the NFP has enabled the [FWS] to hire and dedicate many biologists in order to expedite consultations related to the NFP. Funding these positions has successfully streamlined and expedited fire-related consultations, while allowing the Service to continue its assistance to agencies implementing these projects. Thus, informal consultations are generally completed within 30 days or less. . . . Considering the other regulatory processes (such as the National Environmental Policy Act, consultation with the State Historic Preservation Office, and Native American consultation), these regulations are unlikely to reduce the time frame for decisions.

Id. at K391 (emphasis added).

These concerns were echoed by other Regional Directors and offices. The FWS's Regional Director of Region 5 in Massachusetts, stated that "we have significant concerns about the regulation as proposed," FWS CR A.R., Vol. 6, at K414, including because the "basic design of this regulation as proposed is based on flawed premises and is unlikely to achieve any net efficiencies in processing time for [not likely to adversely affect determinations]," and because "Action Agencies will be challenged to maintain biological objectivity in light of differences in primary agency missions." Id. at K416 (emphasis added); see also id. ("[W]ildlife biology applied in the context of the ESA is a highly specialized field in which no other agency has equivalent expertise . . . The Service's expertise is constantly evolving based on assimilation of new information by Service biologists.").[8]

Defendants also received more than 50,000 public comments on the proposed rule, the vast majority of which urged the Administration to jettison the proposal. See FWS CR A.R., Vol. 3, at F42.[9] Plaintiffs and many other conservation organizations, scientists, and concerned citizens urged defendants not to adopt the proposed rule for many reasons, including because of its deleterious

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[8] Likewise, the FWS's Regional Director in Portland, Oregon, along with the Manager of the Service's California/Nevada Operations Office described the "important role of the informal consultation process in the conservation of listed species and the ecosystems upon which they depend," as well as the "likelihood of adverse effects to listed species and critical habitats caused by these types of actions," i.e., logging operations, road building, and other "fuel treatment actions." FWS CR A.R., Vol. 6, at K383, K384. These officials also noted that the Services and action agencies had already adopted "formalized streamlined consultation procedures" that allowed any necessary wildfire projects to move forward rapidly without sacrificing the species protections afforded by the consultation process. Id. at K384.

[9] As part of the Administrative Record, defendants have provided a CD-Rom containing what defendants have characterized as "non-substantive email comments from the public." April 1, 2005 Letter from Mark A. Brown (attached as Exh. 2), at 3. According to defendants, "[d]ue to the volume of these comments," no "detailed index" of them has been prepared, but the government has acknowledged that the "majority of these comments were in opposition to the proposed counterpart regulations." Id.

effects on the Lynx and other listed species greatly affected by logging, fire suppression, and related activities. Plaintiffs Defenders of Wildlife, American Lands Alliance, and Northwest Ecosystem Alliance, along with the Natural Resources Defense Council, National Wildlife Federation, and the Endangered Species Coalition advised the FWS that the proposal "would make several patently unlawful and unwarranted changes to regulations implementing a bedrock provision of this country's most important wildlife protection law – section 7(a)(2)" of the ESA. FWS CR A.R., Vol. 6, at K149. The conservation groups explained that the proposal "would not only eliminate section 7 consultation with the Services altogether on possibly thousands of NFP projects posing serious risks to endangered and threatened species," but "would also establish a dangerous precedent for further weakening of the ESA," since the proposal's rationale for eliminating informal consultation on NFP projects could just as easily be applied to other agencies and activities. Id.[10]

In their August 4, 2003 comment letter, plaintiffs also explained that the "[A]dministration has failed to offer any empirical evidence" demonstrating that needed projects have been unnecessarily delayed by consultations under the ESA or other environmental reviews. Id. at K150. Plaintiffs further pointed out that the July 2003 Notice had ignored reports by the General Accounting Office and others demonstrating that the vast majority of NFP-related projects had been

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[10] Plaintiffs' comments pointed out that the FWS annually "reviews more than 72,000 federal actions through the section 7 consultation process and of this total, approximately 93% are resolved through informal consultation . . . Thus, if the section 7 changes proposed by the Bush Administration regarding NFP projects were applied to all federal agency actions, approximately 67,000 federal actions that are currently required to undergo section 7 consultation each year because they pose some risk to endangered or threatened species, would escape consultation and the expert scrutiny of the Services entirely." FWS CR A.R., Vol. 6, at K150 (emphasis in original). This scenario is far from fanciful since, as explained below, the precedent established by the Self-Consultation Regulation is already being extended to other activities and programs. See infra at n. 29.

subject to rapid consultation and other environmental reviews and appeals. Id.

2. Defendants' Cursory Environmental Assessment On The Regulation

On September 30, 2003, the FWS and NMFS issued a six-page Environmental Assessment regarding the proposed Self-Consultation Regulation, which asserted that the regulations "would not have any environmental effects," Environmental Assessment for the Healthy Forests Initiative Counterpart Regulations, at 5 (Sept. 30, 2003), FWS CR A.R., Vol. 4, at G180 (emphasis added). Thus, while asserting that the "Action Agency will reach the same NLAA determination that the Services would reach, therefore exactly the same projects would proceed under the counterpart rule as under the current section 7 process," id. (emphasis added), the EA made no mention of the views of the FWS's own Regional Directors that the Services' involvement has actually played a vital role in safeguarding imperilled species, see supra at 24, and, once again, contained no independent analysis of the circumstances under which the FWS and NMFS have disagreed with action agencies' NLAA determinations in the past, or the extent to which USFS and BLM projects have been modified, as a consequence of the consultation process, to enhance the conservation of listed species.

The September 30, 2003 EA also asserted that the "goal of the proposed counterpart regulations is to accelerate the process of approving NFP projects by reducing the time and effort needed to conduct a consultation for a NFP activity," but, once again, defendants did not provide any empirical evidence that consultation with the FWS or NMFS has inappropriately delayed any necessary NFP projects. Id. at G182. The EA instead flatly acknowledged that there are "streamlining processes" already in place that "work well," and that allow "established timelines [to] be met" without any changes in the consultation regulations. Id. at G183.

Nonetheless, according to the EA, even these "streamlined processes" "still encumber the

Services' biologists" and "divert their attention from actions that require formal consultation." FWS CR A.R., Vol. 4, at G183 (emphasis added). Yet the EA also offered no evidence to support that proposition, nor did it advise the public that the FWS's own Regional offices – where the consultations are actually carried out – had stated that "informal consultation is already an efficient, timely process," id. at Vol. 6, at K421, and that the "claim that 'the concurrence process has diverted some of the consultation resources of the Service from projects in greater need of consultation and caused delays' is untenable." Id. at K427.[11]

On October 9, 2003, defendants published a Federal Register Notice that "reopen[ed] the comment period to allow all interested parties to comment simultaneously on the proposed rule and the associated Environmental Assessment." 68 Fed. Reg. 58298. In response, conservation organizations again urged defendants not to adopt the proposed rule, and also pointed out patent inadequacies in the flimsy EA and urged defendants to prepare a full EIS on the proposed rule change. See, e.g., FWS CR A.R., Vol. 6, at K15 (comments of Southern Environmental Law Center) ("the EA totally fails to analyze the environmental effects of the proposed regulations"); id. at K21 (comments of Idaho Conservation League) ("the cumulative effects of this exemption may indeed have significant impacts on listed species").

[11] The cursory nature of the EA is unsurprising in view of the fact that, rather than make a serious effort at NEPA compliance, the Administrative Record reflects that defendants instead decided "to do a quick EA to take the issue off the table," FWS CR A.R., Vol. 3, at D3 (4/21/04 e-mail from Ann Klee), and determined that it "could be done in as little as a week." Id. at D4 (emphasis added).

3. Defendants' Adoption Of The Final Self-Consultation Regulation And Accompanying "Alternative Conservation Agreements"

The overwhelming public (and internal agency) opposition did not dissuade defendants from going forward with their proposed Self-Consultation Regulation, presumably because, as the Administrative Record makes clear, defendants had decided to adopt the Regulation before defendants even looked at the comments. See FWS CR A.R., Vol. 3, at F42 ("We received over 50,000 comments . . . Once we have analyzed the comments, we anticipate setting up a meeting with the group to finalize the regulation."); id. at F40 ("As soon as I summarize the substantial comments on the rule, we will likely set up a meeting to discuss finalizing the regulation itself.") (emphasis added); id. at F29 (9/16/03 e-mail from DOI official Ann Klee stating that "[i]t would be my hope that we could then review the comments on the EA expeditiously and have the final rule over to OMB by no later than November 15") (emphasis added). Indeed, defendants were determined to adopt the rule, although even officials with the Office of Management Budget ("OMB") and the CEQ were at a loss to understand precisely what problem the Regulation was designed to "fix," or even what projects the Regulation actually covers.[12]

In any case, on December 8, 2003, without first issuing an EIS or making any changes to the EA, defendants published their final rule "codify[ing] joint counterpart regulations for consultation

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[12] See, e.g., FWS CR A.R., Vol. 3, at E140 (e-mail from FWS offical to CEQ official stating that the "gist of your comments seemed to be that we need to establish that a fix is needed before reaching the conclusion that counterpart regulations are the solution . . . I am not at all comfortable in trying to establish that the consultation process is in need of fixing since we have little (and only anecdotal) evidence that hazardous fuels treatment projects are being delayed by section 7 consultation.") (emphasis added); id. at E143 (comment by CEQ official on draft of regulation, stating "Ok, so why do we need to fix anything?"); id. at E106 (memo stating that OMB official had asked "what really defines a Fire Plan Project?" and "thinks we need to provide a tighter description of what constitutes a Fire Plan Project").

under section 7 . . .." 68 Fed. Reg. 68254, FWS CR A.R., Vol. 4, at H81-92. The final rule, which was "virtually identical to the proposed rule," id. at H140 (e-mail from Interior Department official Ann Klee), "establishes a process by which an Action Agency may determine that a proposed Fire Plan Project is not likely to adversely affect any listed species or designated critical habitat without conducting formal or informal consultation or obtaining written concurrence from the Service." 68 Fed. Reg. 68264 (emphasis added). Far from providing a clearer explanation of the universe of projects to which the regulation applies, the Regulation simply states that a "Fire Plan Project is an action determined by the Action Agency to be within the scope of the NFP as defined by this section," id. (emphasis added), and allows no opportunity whatsoever for the FWS or NMFS even to review a decision by the action agency to invoke the self-consultation process.

The Regulation defines the NFP as the "September 8, 2000, report to the President from the Departments of the Interior and Agriculture . . . outlining a new approach to managing fires, together with the accompanying budget requests, strategies, plans, and direction, or any amendments thereto," but, as in the proposed rule, the final rule does not even delineate which specific "budget requests, strategies, plans," "direction[s]" and "amendments" are covered by the new Regulation. Id. (emphasis added). The preamble to the Regulation, however, acknowledges that the "definition [of NFP project] is broad," and that the action agency has the "ultimate[]" responsibility to determine which of its projects will be exempted from consultation with the FWS. Id. at 68259; see also FWS CR A.R., Vol. 2, at B13 (e-mail from FWS employee stating "[w]e started out in a shaky position, and I feel that we've only gotten worse . . . [A]ll power is in the hands of the action agency. They initiate the process . . . and unilaterally decide what projects are 'NFP' projects.") (emphasis added).

The Regulation "permit[s] an Action Agency to enter into an Alternative Consultation

Agreement ('ACA') with the Service . . . which will allow the Action Agency to determine that a Fire Plan Project is 'not likely to adversely affect' (NLAA) a listed species or designated critical habitat without formal or informal consultation with the Service or written concurrence from the Service. An NLAA determination for a Fire Plan Project made under an ACA . . . completes the Action Agency's statutory obligation to consult with the Service for that Project." 68 Fed. Reg. 68264 (emphasis added). The preamble to the Regulation acknowledges that it will allow action agencies to avoid any consultation with the FWS with regard to many land-disturbing projects that may affect the Lynx and other listed species and their critical habitats, including "mechanical fuels treatments (thinning and removal of fuels to prescribed objectives)" – i.e., logging – and "road maintenance and operation activities." 68 Fed. Reg. 68255.

In response to comments that the "proposed rule has failed to offer any empirical evidence substantiating the claim that the regulatory obstacles have unnecessarily delayed active land management activities," the preamble to the final rule again fails to furnish any such information. Id. at 68258. Instead, it states that the "issue is not whether the regulatory process has delayed NFP projects" – which defendants said was "the issue" in the June 2003 proposal, see 68 Fed. Reg. 33808 – "but rather whether it can be streamlined so as to expedite the projects . . .." Id. at 68258. Moreover, because defendants could not produce any evidence of past delays caused by consultation, the preamble instead asserted that the "Service[s] anticipate[] that the number of consultations requested for projects that implement the NFP will increase substantially in the future, as additional funding and effort is directed toward implementation of the NFP," id., and that "[w]ith the anticipated increase in fire plan projects, the concurrence process could cause delays." Id. at 68257 (emphasis added).

Yet the preamble sets forth no data or analysis addressing the extent to which the number of requested consultations will "increase substantially in the future," or the extent to which any such speculated increase will be likely to "cause delays" in the approval of necessary projects. Nor did the preamble explain why streamlining efforts previously adopted – including those highlighted by the FWS's Regional Directors – would not be adequate to address the predicted upsurge in projects necessitating consultation.

In March 2004, the FWS and NMFS entered into "Alternative Consultation Agreements" with the USFS and BLM. Those agreements implement the new Regulation by specifically authorizing the USFS and BLM to avoid consultation with the Services for any projects that the USFS and BLM themselves determine are (1) "within the scope of the NFP" and (2) are not likely to adversely affect any "listed threatened, endangered and proposed species" or any "designated and proposed critical habitat." See FWS CR A.R., Vol. 5, at J65 (ACA with Forest Service); id. at J73 (agreement with BLM). According to the signed Agreements – which are identical – the Self-Consultation Agreements "may be used by any Forest Service [or BLM] biologist, botanist, or ecologist who conducts section 7 effects analyses for proposed actions that are Fire Plan projects" and has completed the "required training." Id. at J66, J74. The Agreements do not define what is meant by "Fire Plan Projects" covered by the Agreements, but, rather, simply provide that "Fire Plan Projects" "are actions determined by the Forest Service [or BLM] to be within the scope of the NFP, such as . . . mechanical fuels treatment (thinning and removal of fuels to prescribed objectives)" – i.e., logging – as well as "road maintenance and operation activities." Id. at J65, J73 (emphasis added).

The Agreements further provide that the "training program" for USFS and BLM employees

who will use the Self-Consultation Regulation "will be delivered via a web based system,"and that the USFS and BLM will "annually" compile and provide the FWS and NMFS with a "list of NFP projects for which the counterpart consultation regulations were used." Id. at J68, J76. Based on these "lists," the signatories to the Agreements commit to a "monitoring program" "every three years following the first year" to review a "random sample" of NLAA decisions by the actions agencies, and "determine with a mutually agreed upon level of confidence that the Forest Service [or BLM] is making the determinations appropriately." Id. (emphasis added).[13]

The ACA's prescribe no particular consequences that must flow from the triennial "monitoring" of a "sample" of self-consultation decisions and, in particular, do not provide that even patently erroneous NLAA determinations may be reversed by the monitoring "Team" (which itself must include representatives of the action agencies). Rather, even if the "Team" finds that "several determinations made for a fuel treatment project were not made consistent with the best available scientific" information, the ACA's merely provide that the "Team may recommend further focused review of determinations for similar types of projects." Id. at J69, J77 (emphasis added).

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[13] According to the ACA's, the purpose of the monitoring program is simply to "evaluate whether the Forest Service [or BLM] demonstrated a rational connection between the . . . proposed action and NLAA determination." Id. at J69, J77 (emphasis added). The Record further reinforces that the "monitoring" is not designed to "evaluate whether the Action Agency made the same determination the Service would have made on a project, but, instead, evaluates whether they ma[de] a rational connection between the information and the NLAA determination." FWS CR A.R., Vol. 5, at I113 (2/12/04 e-mail from FWS official) (emphasis added). And, even with regard to that minimal standard, the Record reflects that defendants will be satisfied if the "Action Agency is making 95% of their determinations accurately." Id. at I124 (2/12/04 e-mail from FWS official) (emphasis added). In other words, the self-consultation approach will evidently be deemed a success if the action agency makes the clearly wrong call on the adverse impacts to listed species or their critical habitat – and hence erroneously bypasses formal consultation – with regard to "only" 1 out of every 20 projects. See also id. at I47 ("We want to be almost 100 percent sure that the Action Agency is making the determinations correctly 95% of the time.").

Following the signing of the ACAs, defendants developed a "web-based training course" that, according to a May 2004 BLM memorandum, "should take about an hour" to complete by BLM or USFS employees seeking to engage in self-consultation. BLM CR A.R. at 42 (emphasis added). Id. In providing for the "training," USFS and BLM also advised their employees that "[u]nder the counterpart regulations, the action agency's responsibility to do [an] effects analysis and potentially make and document a NLAA determination . . . now becomes the final consultation requirement under the ESA." NMFS CR A.R., Vol. 4, at Enclosure 3 (emphasis added). Following the one hour "training" course, Forest Service and BLM employees are authorized to make these "final consultation" decisions under the ESA once they pass an on-line exam that consists of 68 generic multiple choice and true/false questions, such as "Question 9": "The action agencies employ large professional staffs of biologists, botanists, and ecologists. a) True b) False," and "Question 10": "The concurrence process has used the Services [sic] limited resources that could be better used to do formal consultations. a) True b) False." NMFS CR A.R., Vol. 4, at Enclosure (May 4, 2004 Counterpart Regulations Certification Exam Module Q & As).[14]

Forest Service and BLM employees have now taken the "training" course and passed the "exam" and, as set forth in the attached standing declarations, they are now using the counterpart regulations to routinely avoid any consultation with the FWS and/or NMFS regarding various timber cutting, road building, and other habitat-disturbing projects, including many such projects in the habitat of Lynx and other listed species as to which plaintiffs have concrete recreational,

[14] Incidentally, to pass the "exam," BLM and USFS employees must answer both questions as "True," NMFS CR A.R., Vol. 4, at Doc. 267, Attachment, although, as noted previously, the FWS's own Regional Directors do not believe it is the case that the Services' resources spent on informal consultations would be "better used to do formal consultations," or are diverting needed resources from formal consultations. See supra at 28.

professional, aesthetic and other interests.[15]

ARGUMENT

This case is brought under the ESA's citizen suit provision, 16 U.S.C. § 1540(g), and under the APA, 5 U.S.C. § 706(2). Under the APA's standard of review, an action must be set aside if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). In conducting its review under the APA, "a court must consider whether the agency acted within the scope of its legal authority, whether the agency adequately explained its decision, whether the agency based its decision on facts in the record, and whether the agency considered the relevant factors." Lynx III, 239 F. Supp. 2d at 17 (citing Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 378 (1989)). In reviewing the agency's decision, the Court "may not supply a reasoned basis for the agency's action that the agency itself has not given," Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Auto. Ins. Co., 463 U.S. 29, 43 (1983) (internal citations omitted), and, "[i]f an agency fails to articulate a rational basis for its decision, it is appropriate to remand for reasoned decision-making." Lynx III, 239 F. Supp. 2d at 17-18. When these principles are applied here, it is clear that both the Self-Consultation Regulation and the FWS's July 2003 Notice on the Lynx listing issue must be set aside.

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[15] Indeed, as set forth in the accompanying Declarations plaintiffs are submitting to establish standing and that there is a ripe controversy concerning the Self-Consultation Regulation, the Regulation has already been employed to exempt from consultation more projects with potential impacts on Lynx habitat than projects affecting any other species. See Declaration of Andrew Hawley (Exh. 3) at ¶ 7; see also Declaration of David Werntz (Exh. 4); Declaration of Jym St. Pierre (Exh. 5); Declaration of Sara Mounsey (Exh. 6); Declaration of Bruce M. Pendery (Exh. 7); Declaration of Karlyn A. Berg (Exh. 8); Declaration of Amaroq Eden Weiss (Exh. 9); Declaration of Mark Skatrud (Exh. 10); Declaration of Todd Schulke (Exh. 11); Declaration of Susanne Stone (Exh. 12).

I. THE SERVICE'S LATEST REFUSAL TO LIST THE LYNX AS ENDANGERED FAILS TO RESPOND TO THE SPECIFIC ISSUE REMANDED BY THE COURT.

While the background leading up to the FWS's latest listing decision concerning the Lynx is lengthy, see supra at 6-20, the legal issue presented by the decision is straightforward – the Service simply failed to address the specific issue remanded by the Court. As explained previously, the FWS certainly understood what issue the Court had remanded, since the agency repeatedly stressed, in its July 2003 Notice, that the "only portion of our March 24, 2000 final listing determination that the court remanded for further consideration was our determination that '[c]ollectively, the Northeast, Great Lakes and Southern Rockies do not constitute a significant portion of the range of the DPS.'" 68 Fed. Reg. 40080 (emphasis added).[16] Once again, the Court remanded only that issue because, in the 2000 rule, the FWS "itself acknowledged the imperilled status of the Lynx in at least two of its historical regions," and suggested that Lynx were, at best, "rare" in the third. Lynx III, 239 F. Supp. 2d at 18, 19. Accordingly, based on the 2000 record, if these three regions were deemed to be a "significant" portion of the range, then it is clear that Lynx should have been listed as endangered under the analysis adopted by the Ninth Circuit in Defenders of Wildlife, 258 F.3d at 1145, and endorsed by this Court in Lynx III.

Yet the July 2003 Notice is devoid of any response to the "only" issue the Court remanded – i.e., nowhere in the lengthy Notice does the Service ever engage in a "reanalysis" of, and make a

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[16] See also id. at 40081 ("The District Court found our determination that the Northeast, Great Lakes, and the Southern Rockies do not constitute a significant portion of the range of the lynx was arbitrary and capricious, and as a result of that finding, directed us to reevaluate it") (emphasis added); id. at 40084 ("In the final rule, we found that '[c]ollectively, the Northeast, Great Lakes, and Southern Rockies do not constitute a significant portion of the range of the DPS.' The following reanalysis of that finding is based on the administrative record, information obtained by the Service during the comment period opened to address the issue on remand, and the Court's opinion in the litigation.") (emphasis added).

new "finding" on, whether "[c]ollectively, the Northeast, Great Lakes, and Southern Rockies . . . constitute a significant portion of the range of the DPS." Id. The unavoidable conclusion is that the FWS did not want to make a new finding on that issue, not only because, as the Court held in Lynx III, this would be determinative of whether Lynx should be listed as endangered, but also because such a finding has enormous importance for how the FWS carries out its other obligations under the ESA, including its consultations under section 7(a)(2) and its ongoing designation of critical habitat.

Hence, if these large geographical areas are deemed "significant" to the Lynx's survival and recovery in the contiguous U.S. – as they surely are, since they comprise more than half of all Lynx habitat in the contiguous U.S., see 68 Fed. Reg. 40099 – then the Service cannot simply write them off (as it effectively did in its 2000 decision) when it prepares Biological Opinions or designates critical habitat. In any event, whatever the Service's motivation for sidestepping the question, the agency – which neither appealed the Court's ruling on the listing issue, nor asked this Court to amend it – could not simply ignore the "limited," but vital, issue that the agency clearly recognized had been remanded by the Court, 68 Fed. Reg. 40080, and as to which it had solicited (and received) additional public comment confirming the ongoing importance of these areas to the survival and recovery of Lynx in the U.S.[17]

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[17] See, e.g., 2003 Lynx AR at 3048-49 (comments of former FWS Director Jamie Clark) ("[T]he Southern Rockies, Great Lakes, and Northeast" are 'significant' within the meaning of the ESA for several reasons. Most prominently, they comprise a vast area of the suitable habitat of the species, including both current and historical range, within the continuous United States, an area that cannot be written off simply due to the greater convenience of managing lynx in federal wilderness and other protected areas in the Northern Rockies . . . The Service cannot credibly contend that the entire Southern Rockies, Great Lakes, and Northeast Regions are not 'major geographical areas,' nor that the species was not once found in those areas in greater numbers.) (Emphasis added); id. ("The Southern Rockies, Great Lakes, and Northeast regions are significant for the species not only in their scope and potential quantity of habitat, but also for the distinctive characteristics of that habitat. The Southern Rockies, Great Lakes, and Northeast

Indeed, instead of providing a straightforward answer to the "limited" issue remanded by the Court, defendants took it upon themselves to address a different issue – i.e., whether the Lynx is "in danger of extinction throughout a significant portion of its range within the Northeast, Great Lakes, or Southern Rockies," 68 Fed. Reg. 40101 (emphasis added) – and "conclud[ed] that the contiguous United States DPS of the lynx is not in danger of extinction throughout a significant portion of its range within" these geographical areas, id. (emphasis added), although, in 2000, the Service came to the opposite conclusion, as the Court's ruling in Lynx III makes clear. See 239 F. Supp. 2d at 20 ("the Service's own Final Rule makes clear that 'there are major geographical areas [in the Northeast, Great Lakes, and Southern Rockies] in which [the Lynx] is no longer viable but once was'"). But even assuming that the FWS had been authorized by the Court to revisit that issue – and plaintiffs do not believe that is the case – the Service not only failed to reopen public comment on the issue, but also suggested that it had refused to consider any such comments from the public on the grounds that the issue was not part of the Court's remand:

> We received numerous comments covering a broad spectrum of lynx-related issues that are not the subject of this notice or are beyond the scope of the court's remand. We are not addressing these comments in this document . . . In particular, we received a number of comments as to the status of the lynx throughout the U.S. DPS (i.e., endangered, threatened, or neither). However, the only portion of our March 24, 2000 final listing determination that the court remanded for further consideration was our determination that '[c]ollectively, the Northeast, Great Lakes, and Southern Rockies do not constitute a significant portion of the range of the DPS.'

68 Fed. Reg. at 40080 (emphasis added).[18]

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regions have ecological characteristics that differ from the Northern Rockies, including but not limited to different forest composition and snowfall distribution, connectivity with lynx populations in Canada, and possibly different lynx and hare population dynamics.").

[18] See also 2003 Lynx A.R. at 134-135; id. at 50 (e-mail from FWS employee stating that it "[s]eems like we're saying we only want comments on lynx habitat and quantity and quality,

This paradoxical course of conduct also resulted in a totally skewed and result-oriented analysis of the issues revisited in the 2003 Notice. For example, as noted previously, the Service made new findings regarding the value of the LCAS in mitigating impacts of projects on Lynx on public lands, but afforded the public no opportunity to point out that the USFS and BLM are not, in fact, implementing the LCAS, or amending their land use plans, consistent with the LCAS. See supra at 19. Likewise, while finding that the threat to Lynx from fire suppression activities is "currently low," 68 Fed. Reg. 40094, the FWS did not address, or solicit public comment on, the likely impact on Lynx from implementation of the Administration's "Healthy Forests Initiative" or its proposal – which was pending when the new Notice was issued – to curtail consultations on NFP projects.[19]

Finally, even aside from its incongruous approach to public comment, the new Notice fails to support its ultimate finding that the Lynx "is not in danger of extinction throughout a significant portion of its range within the Northeast, Great Lakes, or Southern Rockies and therefore does not warrant reclassification to 'endangered' status . . .." 68 Fed. Reg. 40101. Indeed, as in 2000, the July

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but the new information we're considering is about much more than that").

[19] Similarly, with respect to global warming – which poses particular risks to snow-dependent species like the Lynx – the new Notice acknowledges that, "[i]f average annual snow depth substantially decreases in the Northeast, as Hoving (2001) theorized could happen as a result of global warming, appropriate lynx habitat would be diminished and could be completely eliminated if appropriate climate conditions did not return." 68 Fed. Reg. 40098 (emphasis added). Yet the FWS declined to list the Lynx as endangered on the basis of this threat on the grounds that the "potential for long-term reductions in snow depth because of climate change is speculative at this time and is not a threat to the lynx." Id. (emphasis added). However, if the Service had solicited and then seriously scrutinized scientific comment on whether "climate change" is only "speculative" – instead of dismissing the issue so cavalierly – it may well have come to a different conclusion. See, e.g., Data from Space, Oceans Validate Global Warming Timeline, Washington Post, April 29, 2005, at A13 ("Climate scientists armed with new data from the ocean depths and from space satellites have found that Earth is absorbing much more heat than it is giving off, which they say validates computer projections of global warming.").

2003 Notice "makes clear that 'there are major geographical areas in which [the Lynx] is no longer viable but once was.'" Lynx III, 239 F. Supp. 2d at 20 (quoting Defenders of Wildlife, 258 F.3d at 1145) (emphasis added).[20] Moreover, the Service again found that the entire Southern Rockies population "faces possible extirpation," 68 Fed. Reg. 40100; that "changing timber harvest regimes on non-Federal lands in the Northeast" may have potentially "severe impacts" on the small Lynx population in Maine, id. at 40099; and that, in the Great Lakes – where the Service found there is a "resident Lynx population" in northeastern Minnesota, id. at 40088 – "timber harvest is the predominant use of the forests where lynx habitat occurs," "fire suppression may reduce the quality of Lynx habitat in the Great Lakes," and that, "at this time" – five years after the Lynx was listed as threatened – "most Federal land management plans [still] have not been amended or revised to provide long-term conservation of lynx." Id. at 40095 (emphasis added).

In sum, under these circumstances – where the FWS refused to resolve the specific issue the Court remanded, failed to solicit public comment on the issue the Service did resolve, and advised the public that it was not considering public comment on that issue – the Court should again remand the listing issue so that the Service actually addresses the specific issue the Court previously remanded and so that, if the Court authorizes the Service to reopen matters beyond that limited remand, the agency does so based on full public comment, as required by section 4 of the ESA and

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[20] See, e.g., 68 Fed. Reg. 40087 ("we believe that a small resident lynx population historically occurred in New Hampshire but no longer exists"); id. ("A resident lynx population reportedly occurred in the northern regions of New York, particularly in the Adirondacks Mountains, but it was considered extirpated by 1900"); id. at 40091 ("we believe that a viable native resident lynx population no longer exists in Colorado"); see also id. at 40090 (lynx "were distributed throughout northern Idaho in the early 1940s," but "Lynx reports in Idaho have been few in the past 20 years:); id. ("It is possible . . . that in the past a resident lynx population occurred in northwestern Wyoming. However, few lynx have been found during several recent surveys").

the APA, and in light of the "best available" scientific data. 16 U.S.C. § 1533(b)(1)(A).

II. THE SELF-CONSULTATION REGULATION IS CONTRARY TO THE ESA, THE APA, AND NEPA.

As discussed below, it is impossible to harmonize the Regulation with the plain language and legislative history of section 7 of the ESA, or with the overall design and purpose of the Act. Even if the Regulation could somehow be reconciled with the ESA, defendants have not proffered even a coherent rationale for dramatically changing their longstanding approach to compliance with section 7, let alone a rationale that is supported by evidence in the record. Finally, defendants' EA on the Regulation is woefully inadequate to discharge defendants' obligations under NEPA.

A. The Regulation Flagrantly Violates The ESA.

In determining whether the regulation violates the ESA, the Court applies the familiar two-part test of Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). "Under Chevron's first step," the Court "ask[s] 'whether Congress has directly spoken to the precise question at issue,' for if 'the intent of Congress is clear, that is the end of the matter . . . [T]he court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.'" Nuclear Energy Inst. Inc. v. EPA, 373 F.3d 1251, 1269 (D.C. Cir. 2004) (quoting Chevron, 467 U.S. at 842-43). Only "[i]f the statute is 'silent or ambiguous with respect to the specific issue,'" does the Court "proceed to Chevron's second step, asking whether the agency's interpretation 'is based on a permissible construction of the statute.'" Nuclear Energy Institute, 373 F.3d at 1269 (quoting Chevron, 467 U.S. at 843).

Here, the Court need proceed no further than the first step of Chevron since, when the "statute's text, structure, legislative history, and purpose" are considered, it is impossible to conclude

that the Self-Consultation Regulations is consistent with Congress's intent in enacting section 7 of the ESA. Public Citizen v. U.S. Dep't of Health and Human Services, 332 F.3d 654, 662 (D.C. Cir. 2003). "[T]urn[ing] first, as we must, to the language of the statute, 'the most important manifestation of Congressional intent,'" id. ("quoting California ex rel. Brown v. Watt, 668 F.2d 1290, 1304 (D.C. Cir. 1981), the language of section 7 of the ESA could hardly be clearer. Indeed, as the Supreme Court has explained, "[o]ne would be hard pressed to find a statutory provision whose terms were any plainer than those in § 7 of the Endangered Species Act." TVA v. Hill, 437 U.S. 153, 173 (1978).

Once again, section 7 – which, tellingly, is captioned "Interagency cooperation," 16 U.S.C. § 1536 (emphasis added) – provides, in pertinent part that:

> Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an 'agency action') is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of species which is determined . . . to be critical . . ..

Id. at § 1536(a)(2) (emphasis added). Hence, since "[w]e begin our interpretation of the provision with the 'assumption that legislative purpose is expressed by the ordinary meaning of the words used,'" Bluewater Network v. EPA, 370 F.3d 1, 13 (D.C. Cir. 2004) (quoting Sec. Indus. Ass'n v. Bd. of Governors, 468 U.S. 137, 149 (1984)), the "ordinary meaning" of the words used in section 7(a)(2) compels the conclusion that Congress commanded – through use of the mandatory "shall" – "consultation with" the FWS or NMFS (the agency experts on listed species) concerning "any action" by an agency that might affect listed species or critical habitat, so as to "insure" that the action would not jeopardize the species or impair its critical habitat. See Miller v. French, 530 U.S. 327, 337 (2000) ("'[T]he mandatory 'shall' . . . normally creates an obligation impervious to judicial

discretion'") (internal citation omitted); see also Sierra Club v. Marsh, 816 F.2d 1376, 1386 (9th Cir. 1987) ("Section 7 imposes a duty of consultation [] on all federal agencies").

Thus, to sustain the Self-Consultation Regulation, the Court "would be forced to ignore the ordinary meaning of plain language," which is precisely what the Supreme Court said federal courts should not do in construing Section 7. TVA v. Hill, 437 U.S. at 173. It is impossible to reconcile the plain statutory language with a rule that allows the FWS and NMFS to be bypassed entirely with regard to a host of land-disturbing activities that may affect listed species and their habitats on "190 million acres of public land," FWS CR A.R., Vol. 10, at S60, including logging operations, road construction, and myriad other projects falling within the open-ended definition of "NFP" projects. 68 Fed. Reg. 68259, 68264; see also FWS CR A.R., Vol. 10, at S102-80 (78 page document summarizing 103 different kinds of NFP activities, including "road construction," "road maintenance," "[l]ogging systems," "development" of "recreational facilities," "[w]ater development," "[h]erbicide control," "[t]hinning," "[f]ence construction," "[a]bandoned mine restoration," and the "application of insecticides and pesticides"). Indeed, a rule that, on its face, authorizes action agencies to "unilaterally decide" which of their projects may be exempted from the traditional consultation process, FWS CR A.R., Vol. 2, at B13, as well as make the final determination – without any review whatsoever by the FWS or NMFS – as to whether their own projects are "likely to adversely affect" listed species or critical habitat, not only flagrantly violates, but makes a total mockery, of section 7(a)(2)'s express requirement for "consultation" on "any project" to "insure" that listed species are not jeopardized or critical habitat is not impaired.[21]

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[21] In response to the "[m]any comment[s]" that "adoption of the counterpart Regulation violates the plain language" of the ESA, the preamble to the final rule stated that the "regulation does not violate the language or spirit of the ESA" because the "counterpart regulation creates a

While the Court's "inquiry begins with the statutory text, and ends there as well if the text is unambiguous," Bedroc, Ltd., LLC v. United States, 541 U.S. 176, 183 (2004) – as it is here – if the Court nonetheless considers the legislative history, it simply reinforces the facial illegality of the Self-Consultation Regulation. Section 7 was described by Congress as "central to resolution of conflicts under the Act" because Congress believed that, "in many instances good faith consultation between the acting agency and the Fish and Wildlife Service can resolve many endangered species conflicts" by ensuring that the action agency incorporates endangered species protections into project decisionmaking and design. H. Rep. No. 1625, 95th Cong., 2d Sess. (1978) ("1978 House Report"), reprinted in ESA Leg. Hist. at 735, 736 (emphasis added).

Accordingly, in describing section 7(a)(2) in 1978 – when Congress amended the provision in response to the Supreme Court's ruling in TVA v. Hill – Congress explained that:

> [i]n addition to requiring Federal agencies to ensure that their actions do not adversely impact endangered species, the section also requires all federal agencies to consult with the

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new, carefully-structured training, monitoring and oversight relationship between the Service and the Action Agency as an alternative for the individual project-based concurrence system that was created in the Subpart B regulatory framework." 68 Fed. Reg. 68260 (emphasis added). But that explanation only serves to highlight the illegality of the Regulation because a system for "training" and post hoc "monitoring" of a small "sample" of USFS and BLM self-consultations every three years, see supra at 32-34, is simply not "consultation" on "any" project that might affect listed species or critical habitat.

Indeed, it is impossible to understand how even defendants can seriously maintain that they are, "in consultation" with the Services, "insur[ing]" that species are not jeopardized or critical habitat destroyed, when the "monitoring" program does not even allow for the reversal of erroneous NLAA determinations and defendants are apparently defining "success" as the USFS and BLM making the clearly wrong calls with respect to the need for formal consultation as to "only" 5% of all NFP projects. See supra at 33 & n. 13. Of course, even if the monitoring" system catches any such errors (assuming that they happen to be included in the "random sample" the monitoring "team" peruses every three years), the potentially irreversible damage to species at risk of extinction will have long since occurred – which is precisely the result Congress sought to avoid by requiring ongoing "consultation" with the Services.

> Department of the Interior (Department of Commerce in the case of marine species) when any of their actions may affected endangered species . . . .

1978 House Report, reprinted in ESA Leg. Hist. at 735 (emphasis added). The legislative history is replete with similar expressions of legislative intent that there be ongoing consultation with the Services regarding any project that "may" affect listed species or critical habitat, i.e., the threshold for informal consultation in the 1986 regulations that is eviscerated by the Self-Consultation Regulation. See, e.g., id. at 744 ("If the Federal action agency or the Secretary determines that a proposed action may affect a listed species or its habitat, immediate consultation shall be undertaken.") (emphasis added); id. at 743 ("It is the responsibility of each agency to review its activities or programs to identify any such activity or program that may affect listed species or their habitat. If a Federal agency determines that its activities or programs may affect listed species or their habitat, the agency should request assistance from the Secretary.") (emphasis added).[22]

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[22] See also id. at 736 ("The efficient operation of the Department's consultation teams is vital if future conflicts between endangered species and Federal development projects are to be avoided. The committee does not believe that part-time personnel can adequately perform the difficult task of consulting with other Federal agencies on projects that may result in species or habitat degradation.") (emphasis added); id. at 743 ("In setting about to insure that its actions will not result in species or habitat degradation, each agency is expected to make use of all available expertise both within its own organization and by consulting with the Secretary.") (emphasis added); S. Rep. No. 874, 95th Cong., 2d Sess. ("1978 Senate Report"), reprinted in ESA Leg. Hist. at 943-44 ("Many, if not most, conflicts between the Endangered Species Act and Federal actions can be resolved by full and good faith consultation between the project agency and the Fish and Wildlife Service or the National Marine Fisheries Service, as appropriate"); id. at 944 ("Under the current section 7 regulations, Federal agencies have a responsibility to identify activities or programs which they undertake that may affect listed species or their critical habitat and to request consultation with the Services concerning those activities or programs.") (emphasis added); see also id. at 957 (Remarks of Senator Culver) ("This section establishes a specific process of consultation which must take place between the construction agency and the U.S. Fish and Wildlife Service (FWS) which implements the Endangered Species Act. This mechanism has led to the resolution of a vast majority of the potential conflicts which have arisen since 1973.").